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No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE AMICUS CURIAE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

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BRIEF FOR THE AMICUS CURIAE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

The National Legal Aid and Defender Association (NLADA) files this Amicus Curiae brief with the consent of all parties.

INTEREST OF AMICUS CURIAE

NLADA is a not- for -profit organization whose purpose is to ensure that effective legal representation is available to persons unable to afford counsel due to their poverty. Its members include the great majority of legal services offices, public defender agencies, and coordinated assigned counsel systems throughout the United States. NLADA also includes two thousand individual members, most of whom are private practitioners.

NLADA joins petitioner in seeking reversal of the decision of the United States Court of Appeals for the Fifth Circuit. The court below held that persons are required to exhaust adequate administrative remedies before bringing a civil action pursuant to 42 U.S.C. § 1983.

Because of NLADA's long involvement in the effort to provide the poor with meaningful access to justice, it has a unique interest in the questions presented by the instant case. Section 1983 has played a critical role in giving poor Americans the procedural means to challenge, in a timely and efficient manner, violations under color of state law of their federal constitutional and statutory rights. The introduction of even a limited administrative exhaustion requirement would significantly burden the ability of NLADA's members to represent their clients effectively in these claims. Further, the additional demands placed on counsel by such a requirement would exacerbate the very basic problem of the availability of counsel to the poor, already reaching crisis proportions due to substantial reductions in funding of the Legal Services Corporation.

NLADA also believes that fundamental federally created constitutional and statutory rights are most secure if persons injured by putatively illegal actions by state or local officials have the maximum freedom to choose the remedy they believe is most likely to redress their grievance, whether it be judicial or administrative. The imposition of even a limited exhaustion of administrative remedies requirement in § 1983 cases, no matter how reasonable such a requirement appears on the surface, will impose significant burdens on courts and litigants while neither making federal rights more secure nor achieving the benefits commonly advanced as the reason for such a requirement.

As a result, NLADA, on behalf of its members and their clients, submits this brief urging reversal of the decision of the Fifth Circuit.

SUMMARY OF ARGUMENT

The imposition of a requirement that § 1983 plaintiffs exhaust adequate administrative remedies will substantially burden courts and litigants without providing off-setting benefits. There are literally thousands of state and local bodies which can be said to be making administrative decisions. There is little uniformity among them and their procedural regularity varies widely. Determinations of adequacy, which will involve difficult questions of fact and law, will have to be made on a case-by-case basis.

It is difficult to justify this burden as there is no showing that litigants do not currently use adequate administrative remedies. An example of the wide use made of these remedies is found in the Aid To Families With Dependent Children Program, 42 U.S.C. §§ 601 *et seq*. More than 99.85% of persons aggrieved by their state's implementation of the federal welfare law pursue their grievances through state administrative procedures rather than the federal courts. The argument that the principal result of even a limited exhaustion requirement will be an increased burden on the courts is supported by the experience of the Second Circuit which has had such an exhaustion requirement for twelve years. Exhaustion has been frequently litigated but rarely required.

An exhaustion requirement will also make civil rights less secure. First, it puts a premium on a litigant's ability to accurately anticipate a court's decision regarding the adequacy of a particular remedy, imposing a heavy penalty on those who guess incorrectly. A litigant who first goes to court but whose case is dismissed for failure to exhaust may be time-barred from invoking a once available remedy and would thus be without any forum. Others who first exhaust lengthy administrative remedies could be prevented from ever filing in court due to statute of limitations problems. Further, because res judicata does not apply to administrative decisions and class relief is

largely unavailable, an exhaustion requirement will preclude the uniform application of federal law.

Finally, the policy reasons cited by the court below in support of an exhaustion requirement do not hold up under scrutiny. First, given the burdens placed on the court by the difficult determination of adequacy, and the fact that Congress has recently imposed a limited exhaustion requirement in prisoner civil-rights cases which comprise over half of all federal court civil rights litigation, arguments that it is necessary to achieve judicial economy cannot stand. Second, since the Article III requirement of ripeness applies to civil actions the benefit to be gained by an exhaustion requirement in this regard is unclear. Third, improvements in the administrative process will encourage litigants to use non-judicial remedies; litigants should not be deprived of their judicial forum because of a general belief that this will somehow lead to better administrative procedures. Fourth, litigants already use those remedies which are simpler, speedier, and less expensive so long as they are perceived as fair. Fifth, the invocation of federalism as a justification for requiring exhaustion is based on the simplistic notion that federalism means automatic deference to any asserted state interest. The better view is that federalism demands a careful balancing of federal and state interests. In the § 1983 context, this balance argues strongly in favor of retaining a plaintiff's choice of forum.

ARGUMENT

A. A Requirement That Section 1983 Plaintiffs Exhaust Adequate Administrative Remedies Will Substantially Burden the Judicial System Without Providing Off-Setting Benefits

1. *Litigants And Courts Will Face Complex And Time-Consuming Threshold Questions Regarding The Adequacy Of Particular Remedies*

Litigants who file § 1983 actions without first submitting to an administrative procedure they believe to be inadequate will

face a burdensome threshold inquiry into the adequacy of the administrative remedy.

Unlike the situation which exists for the federal government where Congress has established a single set of detailed procedures that govern the adjudicatory process, *see*, Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, administrative procedure at the state level is complex, confusing, and anything but uniform. [1] There are a great number of administrative procedures and many varying forms of individual claims; attempts to evaluate the adequacy of a particular procedure will typically present difficult questions of first impression. [2]

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[1] In his study of state administrative law for the American Bar Foundation Professor Frank E. Cooper reported that: "In point of sheer numbers, the proliferation of state agencies is impressive. In several states, as many as sixty or seventy independent agencies make rules and adjudicate contested cases affecting in varied ways the lives, health, fortune, safety, labor and the business of millions of citizens. At a conservative estimate, more than 2000 state administrative agencies are exercising legislative and judicial functions. In carrying out their duties they are to a large degree independent of the legislatures and the courts. Further, they are significantly independent of each other. This self-assertive independence of the state agencies is reflected not only in the baffling heterogeneity of procedural rules, which is the source of needless confusion, but more importantly, in the widely disparate approaches to related problems, and in the appreciation of variant principles and philosophies of economic and social control." F. Cooper, STATE ADMINISTRATIVE LAW 1-2 (1965).

[2] While almost all states have now adopted some state-level administrative procedure act, *see* Gellhorn, Byse & Strauss, ADMINISTRATIVE LAW: CASES AND COMMENTS 1148 (7th Ed. 1979), these acts differ from state to state, and only 28 states have adopted legislation based at least in part on the Model State Administrative Procedure Act advanced by the Commissioners on Uniform State Laws. 1 K. Davis, ADMINISTRATIVE LAW TREATISE, § 1:11, at 37 (1978). Even those states which have adopted the Model Act are far from solving the problems identified by Amicus. Professor Davis has extensively criticized the Model Act and has concluded that "The Model Act is something less than a model of what a state APA should be." *Id.* at 51.

Local administrative procedures, which are at an even more primitive stage than at the state level, will pose more problems. State administrative procedure acts do not apply to local administrative decision-makers,[3] and no uniformity move has developed at the local level. Moreover, there are literally thousands of local decision-making bodies that can be said to be making "administrative decisions." These run the gamut of local concerns and have widely varying powers and public visibility. Some are completely obscure except to the bureaucrats charged with administering them.

In order to proceed to the actual determination of the adequacy of any one of this multitude of procedures, this Court as well as the circuit and district courts around the country will first have to develop legal standards for what is an extremely elusive concept in the civil rights context. Questions which will have to be considered will include, at a minimum, the scope of interim and permanent relief available and specifically whether damages or binding injunctive relief may be ordered, the finality of the administrative decision, the length, formality and complexity of the administrative process, the impartiality of the decision-maker and the extent to which the decision-maker was responsible for the underlying decision, and the public awareness of the administrative process itself.[4]

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[3] State administrative procedure acts have generally been held to not be applicable to local administrative bodies, and Antieau has identified only one state that has adopted a broadly applicable local administrative procedure act. Antieau, MUNICIPAL CORPORATION LAW ¶ 3A.08 (1981). *See* also Davis, § 1:10, at 36 (1978).

[4] An additional legal question is the placement of the burden of going forward and the burden of proof on the questions of exhaustion and adequacy. Amicus submits that should even a limited exhaustion requirement be adopted by this Court both of these legal burdens should be on the defendants, who should have to identify the remedies they believe are clearly adequate to vindicate the plaintiff's federal rights.

In light of this, Amicus believes that the disposition of this case by the Fifth Circuit is wrong. In reversing the district court, the court of appeals reman-

In addition to difficult legal issues, many cases will raise complicated questions of fact, requiring discovery and evidentiary hearings. In some instances, the adequacy of the remedy will be the only matter of factual dispute with the result that courts will be required to hold hearings in cases that could otherwise be resolved by a simple motion for summary judgment. The entire process will inevitably be protracted and cumbersome, demanding a great deal of time and effort to be expended by both courts and litigants.

2. *Litigants Use Administrative Remedies Which Are Adequate*

If there were any indication that litigants are frequently and willfully avoiding administrative procedures capable of fully and fairly adjudicating their claims there might be an argument to focus this very substantial amount of court and litigant time on the exhaustion question. Such evidence, however, is singularly lacking. Section 1983 plaintiffs, particularly those represented by counsel, do not make idle choices as to forum. They are extremely unlikely to bypass simple, speedy and inexpensive procedures perceived as just and capable of fully resolving their claim. There is no magic in bringing a case in the federal courts, particularly if it will involve a great deal of time and money with only an uncertain result.

The argument is perhaps most effectively made by looking at those situations where potential § 1983 plaintiffs do use their administrative remedies. An excellent example is found in the Aid to Families With Dependent Children (AFDC) program, 42 U.S.C. §§ 601 *et seq.*, where participating states are required

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ded with directions to permit the plaintiff to amend her complaint. However, this incorrectly assumes an extra pleading burden on plaintiff. *Cf. Gomez* v. *Toledo*, 446 U.S. 635 (1980), where the Supreme Court ruled that the burden is on the defendant in a § 1983 case to plead good faith as an affirmative defense where a good faith immunity might apply. There is no requirement that a plaintiff allege that a defendant acted in bad faith.

to maintain a "fair hearing" procedure which complies with federal guidelines.

The most recent year for which figures are available on numbers of administrative appeals and federal court claims is 1979. In fiscal year 1979, 118,664 requests for fair hearings in AFDC cases were received by state agencies *excluding* Maryland and Ohio, which did not supply data.[5] During calendar year 1979 a total of 186 welfare cases were filed in the federal courts.[6] In other words, more than 99.85% of persons aggrieved by their state's implementation of federal welfare law recognized that it was most appropriate to pursue their claims through the state administrative procedures and not through the federal courts.[7]

While inevitably a certain percentage of state and local administrative procedures will be found to be adequate, Amicus submits that the proportion will be low indeed. The present voluntary model where plaintiffs and their attorneys seek out the most appropriate forum — judicial or administrative — works and should be continued.

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[5] Office of Policy, Office of Research Statistics, Social Security Administration, U.S. Dep't of Health and Human Services, REQUESTS FOR A.F.D.C. HEARINGS IN PUBLIC ASSISTANCE, FISCAL YEAR 1979, at 4 (1981).

[6] Administrative Office of the U.S. Courts, FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE TWELVE MONTH PERIOD ENDED DECEMBER 31, 1979, at A-10 (1980). Amicus recognizes that the two time periods are not identical, but the figures are equivalent from year to year, and the skew is so staggering that the validity of the point is not diminished. Further, the "welfare" category used by the Administrative Office of the Courts encompasses more than just AFDC cases.

[7] Further, there is no indication that the 0.15% of persons who go to federal court in AFDC cases did not first use their state administrative remedies.

3. *The Second Circuit Experience*

Amicus' concerns regarding the burdensome and ineffective nature of a requirement that § 1983 plaintiffs first exhaust adequate administrative remedies are by no means theoretical. Prior to the decision below, the Second Circuit had a longstanding requirement that adequate administrative remedies be exhausted in § 1983 cases, *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). A review of the Second Circuit's experience with *Eisen* fully supports Amicus' arguments.

The starting and most telling point of the analysis is that exhaustion has been frequently litigated but only rarely required in the twelve years since *Eisen* was decided. Adequacy has been strictly defined: a federal court must "be positively assured — it may not presume — that there are speedy, sufficient, and readily available administrative remedies remaining open to pursue." *Morgan* v. *LaVallee*, 526 F.2d 221, 224 (2d Cir. 1975). Although the courts have had to carefully examine and pass judgment on the adequacy of dozens of state and local exhaustion schemes, *see infra*, the great majority have simply not passed muster.

The Second Circuit courts have faced a wide variety of novel questions regarding adequacy which they have had to decide on a case by case basis. The courts have refused to require exhaustion where the administrative decision maker had promulgated the complained of rule or had previously taken a position regarding it, *Hark* v. *Dragon*, 611 F. 2d 11 (2d Cir. 1979); *Goetz* v. *Ansell*, 477 F. 2d 636 (2d Cir. 1973); *Romano* v. *Kirwan*, 391 F. Supp. 643 (W.D.N.Y. 1975) *vacated and remanded on other grounds*, 425 U.S. 929 (1976); *Sostre* v. *Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970); where the decision-maker may be biased, *Fitzgerald* v. *Cawley*, 368 F. Supp. 677 (S.D.N.Y. 1973); where damages were requested but there was no authority to award them, *Plano* v. *Baker*, 504

F. 2d 595 (2d Cir. 1974);[8] *Ray* v. *Fritz*, 468 F. 2d 586 (2d Cir. 1972); or where any administrative order would have to be judicially enforced, *Hupart* v. *Board of Higher Education of City of N.Y.*, 420 F. Supp. 1087 (S.D.N.Y. 1976).

Exhaustion has not been required if the claim turns on factual issues and there is no adequate fact-finding mechanism, *Gonzalez* v. *Shanker*, 533 F. 2d 832 (2d Cir. 1976); *Plano* v. *Baker*, *supra;* if there is no provision for representation of counsel, testimony under oath or subpoena of witnesses or papers, *Gonzalez* v. *Shanker*, *supra;* if it would cause substantial delay, *Hark* v. *Dragon*, *supra; King* v. *Norton*, 336 F. Supp. 255 (D. Conn. 1972); if the claim is on behalf of a class but only individual relief is available, *Swan* v. *Stoneman*, 635 F. 2d 97 (2d Cir. 1980); or if it would be for other reasons futile, *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971); *Lollis* v. *N.Y. State Dept. of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970).

Although most cases have dealt with the fashioning of exceptions to *Eisen*, courts have also had to struggle with the basic question of whether the alleged remedies were actually available. *Russo* v. *Central School District No. 1*, 469 F. 2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *Perzanowski* v. *Saivio*, 369 F. Supp. 223 (D. Conn. 1974).

The Second Circuit has also relied on traditional exceptions to the exhaustion rule. For example, exhaustion has not been required where the challenge is to the adequacy of the very remedy which would have to be exhausted, *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *Fuentes* v. *Roher*, 519 F. 2d 379 (2d Cir. 1975); *Carter* v. *McGinnis*, 351 F. Supp. 787 (W.D.N.Y. 1972).

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[8] The *Plano* court points out that a mere boilerplate claim for damages will not circumvent an exhaustion requirement; such claims must be carefully scrutinized for sufficiency. *See* note 9, *infra*.

In addition, the Second Circuit courts have generally not dismissed for failure to exhaust where a constitutional claim is made. *Public Utilities Commission* v. *United States*, 355 U.S. 534 (1958); *Cordova* v. *Reed*, 521 F. 2d 621 (2d Cir. 1975). *But see Blanton* v. *State University of New York*, 489 F. 2d 377 (2d Cir. 1973). Most courts, however, have required that the constitutional claim be substantial in order to avoid an exhaustion requirement, *see, e.g., Cordova* v. *Reed, supra, Smith* v. *Carey*, 473 F. Supp. 268 (S.D.N.Y. 1979). This will engender complicated threshold inquiries which will only cause further delay.[9]

In sum, the Second Circuit's twelve-year history with an exhaustion requirement analogous to that imposed by the court below demonstrates few dismissals juxtaposed against the growth of a new and arcane area of the law. Far from expediting the speedy and efficient resolution of § 1983 claims, the principal result has been the waste of significant court and litigant time.

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[9] The problem raised by the required determination of substantiality is analogous to the jurisdictional problem which existed with respect to non-equal rights statutory § 1983 claims prior to the removal of the jurisdictional amount requirement in 28 U.S.C. § 1331. *See* Pub. L. No. 96-486. Under the analysis set forth in *Hagans* v. *Lavine*, 415 U.S. 528 (1974), courts were required to determine the substantiality of the jurisdiction-conferring constitutional claim even if the plaintiff could receive full relief on the basis of a pendent non-constitutional claim. It had been suggested that some litigants added non-essential, but substantial, constitutional claims to permit federal courts to hear the pendent federal statutory claims. A further problem which will have to be addressed is whether a claim under the Supremacy Clause will form a constitutional claim sufficient to avoid an exhaustion requirement. *Cf. Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979).

B. An Exhaustion Requirement in Section 1983 Cases Will Render Civil Rights Less Secure

Amicus' opposition to an exhaustion requirement is based on more than the time-consuming and wasteful threshold inquiry it will engender. Important as these problems of delay and burdensomeness are, of equal concern is the fact that with an administrative exhaustion requirement, several classes of injured persons will fail to receive any relief at all for demonstrable violations of their rights. [10]

1. *Litigants Risk The Loss Of Any Adequate Forum If They Wrongly Anticipate A Court's Decision Regarding A Particular Remedy*

An administrative exhaustion requirement creates the very real risk that plaintiffs will lose any adequate forum in which to raise their claims if they wrongly predict whether a court will require the exhaustion of a particular remedy.

Litigants who believe the available remedies to be inadequate and go directly to court will, at a minimum, suffer a delay in their effort to obtain judicial vindication caused by the threshold determination of adequacy. However, because a plaintiff whose § 1983 case is dismissed for failure to exhaust may well be time-barred from invoking a once available administrative procedure, litigants could find themselves completely without a remedy. [11] *Cf. Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975).

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[10] This does not include those persons who have meritorious claims but find the quest for justice simply too burdensome, expensive or discouraging, and abandon it in frustration. The fact that these persons drop their § 1983 claims, thus reducing the burden on the courts, is hardly an argument for an exhaustion requirement.

[11] While it is not absolutely certain that a case would be dismissed, rather than stayed, upon a finding of failure to exhaust an adequate remedy, this was the decision of the court below and has been the course followed by the Second Circuit. *See, e.g., Blanton* v. *State Univ. of N.Y., supra.* A judicially-imposed dismissal rule would be far harsher than the exhaustion rule

Because of this burden and risk, many potential § 1983 plaintiffs will choose first to exhaust administrative remedies they believe to be inadequate. Thus injured persons will accept the likelihood of substantial delay, lack of interim relief, and the expense of duplicative proceedings, and go before a body that is incapable of or unlikely to provide adequate relief. These litigants, however, in spite of their caution and vigilance also face a major risk: they may be precluded from ever litigating their § 1983 claims in court because of statutes of limitations problems. Section 1983 does not contain a statute of limitations and this Court has instructed federal courts to utilize the relevant statute of limitations used in the state in which the federal court sits. Similarly, courts hearing § 1983 actions are also required to apply state policies on the tolling of the statute of limitations. *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). The absence of a federal rule on tolling will mean that in some cases the time expended in exhausting an administrative procedure will result in the running of the statute of limitations, which will deny the parties the ability ultimately to file a § 1983 action.

2. *An Exhaustion Requirement Will Preclude The Uniform Application Of Federal Law*

The doctrine of res judicata and the availability of class relief play an important role in ensuring that federal law is applied uniformly to similarly situated persons. Unlike orders in civil actions, however, administrative decisions are without res judicata effect. As a result, individual decisions will vary widely. *See* discussion in *Swan* v. *Stoneman*, *supra*, at 104-105. [12]

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mandated by Congress under the Civil Rights of Institutionalized Persons Act, which only permits the courts to stay prisoner § 1983 actions for up to 90 days to permit resort to administrative procedures that comply with guidelines promulgated by the U.S. Attorney General. 42 U.S.C. § 1997e.

[12] The lack of res judicata effect also means that administrative decisions will be completely relitigated in the courts, causing further burden and delay.

The problem will be further exacerbated by the fact that class relief is rarely available in administrative hearings. Class actions have been essential to the efforts of the poor and minorities to redress state and local violations of their federal civil rights. Not only have they produced uniformity in the law while achieving significant economies for both courts and litigants, they have also guaranteed that persons who fail to bring claims "because of fear, ignorance, or lack of resources . . . ," Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COL. L. REV. 1201, 1208 (1968), will nonetheless be protected through the assistance of representative parties. *See also Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 586 (1975).

The lack of availability of class treatment and res judicata effect is troubling from another perspective. By favorably settling claims at the administrative level, defendants will be able to moot out individual cases while preserving putatively illegal system-wide practices. [13] In a judicial setting, a case brought as a class action can continue to resolution even if the named plaintiff's claims become moot. *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *cf. Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980). Again, all too often, it will be those most in need of help but without the ability to protect their own interests who will be denied relief as a result of this practice.

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[13] This would be similar to the Social Security Administration's frequent policy of "non-acquiescence," whereby it refuses to apply an individual adverse decision beyond its facts. *See, e.g., Levings* v. *Califano*, 604 F.2d 591 (8th Cir. 1979) and the subsequent administrative non-acquiescence ruling at Social Security Ruling #80-11c. See also discussion in *Swan* v. *Stoneman, supra*, at 105.

C. No Significant Policy Benefits Will Result From The Adoption Of An Exhaustion Of Administrative Remedies Requirement in § 1983 Cases.

The court of appeals based its decision that § 1983 contains an exhaustion of administrative remedies requirement in part on a review of policy considerations. The court concluded that the adoption of an exhaustion of administrative remedies requirement in § 1983 cases will result in (1) a wiser allocation of judicial resources; (2) the assurance that the action complained of is "final within the institution in the sense that it is ripe for adjudication;" (3) improvements in the administrative process; (4) the use of simpler, speedier, and less expensive remedies; and (5) an advancement of federalism and comity.

Amicus submits that, to the contrary, the argument that tangible policy benefits will result from the adoption of an exhaustion of administrative remedies requirement in § 1983 cases is based on incorrect assumptions about the nature and scope of the § 1983 exhaustion problem as well as questionable assumptions as to how litigants and institutions behave. To the extent that benefits may flow from the exhaustion of administrative remedies in potential § 1983 cases, they are far more likely to result from a voluntary exhaustion policy than from the imposition of even a limited mandatory exhaustion requirement.

First, the court of appeals' decision is based in large part on the assumption that there currently is a serious problem of litigants filing § 1983 actions without first exhausting adequate state administrative remedies. However, nowhere does the court cite evidence to support the existence of a problem. Further, the court does not even mention the recently enacted Civil Rights of Institutionalized Persons Act which contains an exhaustion requirement for prisoner § 1983 cases where the available remedies meet certain standards. 42 U.S.C. § 1997e. As a result of this Act, over half of all § 1983 cases filed in the

federal courts are now subject to an exhaustion of adequate administrative remedies requirement. [14] Congress recognized a problem in the number of § 1983 cases and took very specific action to solve it. *See* S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979).

In addition, available information, *see* discussion, *supra*, regarding the Second Circuit experience, strongly suggests that the marginal decrease in the number of non-prisoner § 1983 cases from a limited exhaustion requirement will be minimal. Moreover, courts and litigants will be required to devote substantial resources to questions involving the adequacy of the administrative remedy. In sum, the argument that the courts should impose an exhaustion requirement to achieve judicial economies simply cannot stand.

Second, the court of appeals felt that a reasonable exhaustion requirement will assure that "the action complained of is final within the institution in the sense that it is ripe for adjudication." As part of this concept, the court identified notions of fairness under which grievance machinery should be given an opportunity to work before a defendant is required to respond to litigation.

Since the Article III requirement of a "case or controversy" includes the requirement that cases be ripe it is difficult to understand the advantage to be gained in this regard from an exhaustion requirement. Amicus must assume that the court of appeals is concerned primarily with the latter notion that it is somehow unfair to require a defendant to respond to litigation, where alternative grievance mechanisms may be available.

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[14] For the twelve-month period ending March, 1981, 15,409 prisoner civil rights claims were filed in the federal courts, as compared with 14,741 non-prisoner civil rights claims. Administrative Office of the U.S. Courts, FEDERAL JUDICIAL WORKLOAD STATISTICS FOR THE TWELVE MONTH PERIOD ENDED MARCH 31, 1981, at A-8, A-9 (1981).

However, to the extent defendants develop adequate grievance machinery that potential grievants respect and have confidence in, parties will voluntarily utilize those procedures. [15]

Third, the court of appeals suggests that " . . . a reasonable exhaustion requirement will improve the administrative process itself." Presumably this improvement would result from the increased respect given the state or local procedures. However, the court offers no empirical or other evidence to support this benefit, and the argument that the administrative process will improve because of the adoption of an exhaustion requirement in § 1983 cases is based only on faith. An equally plausible hypothesis is that the best way to improve state and local administrative processes is by continuing the no-exhaustion policy in § 1983 cases and permitting plaintiffs to have the freedom to chose which forum — administrative or judicial — they believe is most likely to protect their federal rights. [16]

Further, it should be noted that in creating the limited exhaustion requirement under the Civil Rights of Institutionalized Persons Act, *supra*, Congress by no means simply assumed that the state procedures would thereby automatically improve. Instead, Congress very carefully created a process under which the United States Attorney General would certify whether a particular grievance mechanism was adequate before exhaustion could be required. It would be ironic, indeed, if non-prisoner civil rights plaintiffs received less protections at the

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[15] Similarly, the absence of a doctrine of respondeat superior in § 1983 will protect defendants who bear no personal responsibility for the injury in question. *Monell* v. *Dep't of Social Services*, 436 U.S. 706 (1978); *Rizzo* v. *Goode*, 423 U.S. 362 (1976).

[16] Amicus suspects that the reality is that neither the presence nor absence of a § 1983 exhaustion requirement has had nearly as much impact on the quality of state or local administrative procedures as has resulted from *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and other procedural due process decisions of this Court.

hands of the courts than prisoners have as a result of congressional action.

Fourth, in characterizing administrative remedies as "generally simpler, speedier, and less expensive . . . " the court of appeals focused only on the benefits accruing to the defendant from solving conflicts with the least court costs and attorney time. However, under the current voluntary system plaintiffs already pursue the forum which will provide swifter and more efficient justice. A mandatory exhaustion requirement will only further burden courts and litigants.

Because none of the policy considerations advanced by the court below hold up under scrutiny, one is finally left with the argument that an exhaustion requirement should be imposed because it will serve the interests of federalism.[17] Such an argument, however, is based on the simplistic notion that federalism is advanced by an automatic deference to any asserted state interest. It ignores the more reasoned view that federalism demands a careful balancing of state and federal concerns. Further, it is incumbent upon the courts to defer to clearly stated congressional policy, where, as here, Congress has made the federal courts the primary "guarantor[s] of basic civil rights against state power." *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972).

Aside from the legislative history arguments which are developed in depth by other Amici, it is important to note that the intrusiveness of the great majority of § 1983 decisions, which are carefully limited to individual fact patterns, can easily be overstated. See *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1189 (1977); Comment,

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[17] Section 1983 cases are brought in state as well as federal courts. See, *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). The federalism arguments are totally inappropriate in state court cases.

Exhaustion of State Remedies Under the Civil Rights Act, supra.

This stands in stark contrast to the extreme intrusiveness of the process whereby federal courts would determine whether a particular state or local administrative remedy is adequate.

In addition, the federalism argument is inconsistent at best in light of the fact that federal "interference" is the *sine qua non* of any § 1983 case. For, in order for there to be a state sanctioned violation of a federal law, there necessarily has already been a federal "intrusion" into the state's prerogatives. See, *Developments in the Law, Section 1983 and Federalism, supra.*

Often such intrusion accompanies the provision of federal financial assistance and is voluntarily accepted by the states as the price of being able to provide necessary services to their citizens. This is particularly true of the state-federal benefit programs such as Aid to Families With Dependent Children 42 U.S.C. §§ 601 *et seq.* and Medical Assistance, 42 U.S.C. §§ 1396 *et seq.* which are of enormous importance of the clients of Amicus' members. It would be ironic to severely burden an individual's ability to enforce his or her federal rights in the name of federalism while permitting a state to enjoy unfettered benefit from its federal connection. [18]

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[18] The federalism argument also rings hollow when one considers that approximately 25% of the federal court caseload consists of diversity cases. Administrative Office of the U.S. Courts, (1981) *supra*, at note 14. This is three times greater than the percentage of all non-prisoner civil rights cases.

CONCLUSION

For the above-stated reasons Amicus Curiae National Legal Aid and Defender Association joins petitioner in urging this court to reverse the decision below and to remand the case for full consideration of the merits.

Respectfully submitted,

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